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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 256

TRUMAN ELVY DENNY AND DELMER ELVY DENNY,
Petitioners,

vs.

D. D. WATSON, REAL ESTATE COMMISSIONER OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

STATEMENT AS TO JURISDICTION

MORRIS LAVINE,
Counsel for Appellants.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

2nd Civil No. 18990

TRUMAN ELVY DENNY AND DELMER ELVY DENNY,
Plaintiffs and Appellants,

vs.

D. D. WATSON, REAL ESTATE COMMISSIONER OF THE STATE OF CALIFORNIA, AND DEPARTMENT OF INVESTMENT OF THE STATE OF CALIFORNIA, DIVISION OF REAL ESTATE,
Defendants and Respondents

JURISDICTIONAL STATEMENT FOR THE ALLOWANCE OF AN APPEAL

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, the petitioners set forth their Jurisdictional Statement for the allowance of an appeal.

The petitioners were licensed real estate brokers of the State of California and had been for several years prior to this case. They did business for several years under the firm name of T. E. Denny and Sons, in the Pasadena area.

The petitioners were sued in the civil court of Pasadena by Mr. and Mrs. Ernest C. Kramer in reference to a real

estate transaction in which it was alleged that the Kramers were induced to convey to Delmer Elvy Denny the title to a 10-unit motel which the Kramer's owned in Glendora by misrepresenting that the title would be held in trust. The motel was encumbered by $33,200.00 first, second and third trust deeds. Possession of the motel was turned over to the Dennys and it was alleged that the Dennys represented that they would take care of all payments due on the trust deeds. On December 6, 1948 the Dennys had the deed recorded but defaulted in payments on the trust deeds, but subsequently, allegedly secured the purchasers for the property. A lawsuit followed between the Kramers and Dennys in which the trial court found in favor of the Kramers and rendered judgment against defendants in the sum of $5,153.83, plus $500.00 as exemplary damages. The case was not appealed and the judgment was thereafter paid or settled.

Based solely on this civil judgment, the Real Estate Commissioner of the State of California filed an accusation against the Dennys, charging violations of Sections 10176(i), 10177(f) and 10177.5 of the Business and Professions Code of the State of California.

Thereafter a hearing officer of the Real Estate Department, Alfred J. McGuire heard the matter. The only testimony on behalf of the Real Estate Commission was the judgment in the civil case, the Dennys appearing in person, but without counsel.

The real estate commissioner thereupon revoked the licenses of the Dennys, and thereupon the petitioners petitioned the Superior Court for a Writ of Mandate. At that hearing on the application for the Writ of Mandate, the Superior Court held that Section 10177.5 of the Business and Professions Code did not violate the due process or the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and held that the

Statue 10177.5 was consitutional and did not inherently or as construed and applied in this case violate the Fourteenth Amendment to the Constitution of the United States. An appeal was thereupon taken to the District Court of Appeal of the State of California, Second Appellate District, Division One, where challenge was again made to those statutes being, inherently and as construed and applied in this case, unconstitutional and violative of both the due process and the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, in that these sections arbitrarily and capriciously single out real estate broker to have their licenses—a valuable property—revoked merely on the basis of a civil judgment for fraud in which the issues are not the same and in which mere conclusions may cause a judgment in a civil action on a bare preponderance of evidence, which does not exist in the case of taking of property; to-wit, a license to practice one's profession, where the quorum of evidence must be definite, to-wit, clear and convincing, and which involve a valuable property right.

The challenge was also on the basis that the statute only applies to real estate brokers and to no other professions which are licensed, of which there are many, including lawyers, doctors, stock brokers, and fiduciaries of all kind and character, financial advisors and business brokers and many other professions requiring licenses based upon integrity, and it singles out merely the real estate broker to revoke his license based upon a civil judgment.

This is the first case anywhere in the United States where one's license has been taken based upon a judgment in a civil case between different parties, upon different issues, singling out a single profession or business.

The District Court of Appeal affirmed the judgments on December 2nd, 1952, (Civil No. 18990), and held that the statutes, inherently and as construed and applied in this

case, were not unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States.

Petitioners thereafter, within the time allowed by law, petitioned the Supreme Court of California for a hearing and that court denied the hearing on January 22, 1953—two justices voting for hearing—thereby affirming the holding of the District Court of Appeal of the State of California, Second Appellate District, Division One, holding that the sections, inherently and as construed and applied, was not and is not unconstitutional under the Fourteenth Amendment to the Constitution of the United States in both its Due Process Clause and its Equal Protection Clause.

On March 30th 1953, petitioners petitioned the Presiding Justice of the District Court of Appeal, Second Appellate District, Division One, for the allowance of an appeal to the Supreme Court of the United States and on April 6th, 1953, that appeal was allowed.

MORRIS LAVINE,
Attorney for Petitioners.

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

Civ. No. 18,990

TRUMAN ELVY DENNY and DELMER ELVY DENNY, *Plaintiffs and Appellants,*

vs.

D. D. WATSON, Real Estate Commissioner of the State of California, and DEPARTMENT OF INVESTMENT OF THE STATE OF CALIFORNIA, DIVISION OF REAL ESTATE, *Defendants and Respondents*

Dist. Court of Appeal, Second Dist., Filed Dec. 2, 1952, J. E. Brown, Clerk.

Appeal from a judgment of the Superior Court of Los Angeles County, Frank G. Swain, Judge, denying a petition for a writ of mandate. Affirmed.

For Appellants: Morris Lavine.

For Respondents: Edmund G. Brown, Attorney General, and Lee B. Stanton, Deputy Attorney General.

Plaintiff's petitioned the Superior Court for a writ of mandate, directing the Real Estate Commissioner of this state to restore to them their licenses as real estate brokers. On the Commissioner's hearing counsel for the Commissioner introduced in evidence findings of fact and judgment in a civil action for fraud against petitioners in the Superior Court, and rested.

The facts so found were that petitioners were doing business together as real estate brokers; that they secured a deed from one of their clients to a motel, on their representations that they would keep up payments on trust deeds, liens against the property, would manage it, and when they sold it would pay their clients $5,500 clear of the debts.

Instead of doing as they had agreed to do, petitioners recorded the deed, failed to keep up the trust deed pay-

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ments, permitted the property to be sold under power of sale in one of the trust deeds, and through a confederate purchased the property for themselves at the sale which followed.

Upon these facts the Superior Court rendered judgment against petitioners. This judgment they paid and satisfied in full.

Proceedings were commenced by the Real Estate Commissioner to revoke petitioners' licenses. After due notice, petitioners appeared at the Commissioner's hearing, without counsel. They were sworn, made their statements and were cross-examined, and participated in the hearing.

The Commissioner found that petitioners had violated sections 10177.5, 10176(i), and 10177(f) of our Business and Professions Code, and revoked their licenses.

The Superior Court refused to grant the writ of mandate, and petitioners appeal from that judgment.

Section 10177.5, Business and Professions Code provides:

"Whenever a final judgment is obtained in a civil action against any real estate licensee upon ground of fraud, misrepresentation or deceit with reference to any transaction for which a license is required under this division, the commissioner may, after hearing in accordance with the provisions of this part relating to hearings, suspend or revoke the license of such real estate licensee at any time within three years subsequent to said judgment."

Petitioners challenge the constitutionality of that Code Section, and of sections 10176(i) and 10177(f) of the same code, and assert that each and all of them violate due process of law guaranteed by our state and federal constitutions. Petitioners also challenge section 10177.5 upon the constitutional ground that it denies them equal protection of the laws, in that it singles out real estate brokers and does not extend to other professions and occupations.

Undoubtedly the Real Estate Commissioner was empowered to determine whether petitioners were guilty of acts involving dishonest dealings. (Brecheen v. Riley, 187 Cal. 121; Sipper v. Urban, 22 Cal. 2d 138; de St. Germain v. Watson, 95 Cal. App. 2d 862.)

No cases directly involving the constitutionality of section 10177.5 have come to the attention of this court, it having been enacted in 1945.

Our California real estate act was first held to be constitutional in Riley v. Chambers, 181 Cal. 589.

Other sections of the act have been approved (Section 10177(b), in Payne v. Real Estate Commissioner, 93 Cal. App. 2d 532.

In cases where business or professional licensees are convicted of felonies involving moral turpitude, the judgment of conviction compels revocation of licenses. (Meyer v. Board of Medical Examiners, 34 Cal. 2d 62; Murrill v. State Board of Accountancy, 97 Cal. App. 2d 709.)

It is pertinent here to say, however, that in this case we are dealing with the effect of a judgment in a civil, not a criminal case. Upon fundamental and familiar principles the weight of the evidence which will warrant a conviction in a criminal case is materially different from that which will support a judgment in a civil case. And in civil cases nine members of a jury determine controverted facts, as against all twelve in criminal cases.

But the statute under consideration does not, *ipso facto* require suspension of revocation of a real estate broker's license. It makes a judgment for fraud in a civil case *prima facie* evidence, upon which the Real Estate Commissioner may suspend or revoke the license.

A hearing is required. Licensees under attack may appear and defend themselves. And the Commissioner in his discretion may continue, or suspend, or revoke licenses.

As the Attorney General argues, the section commends itself from a practical, commercial viewpoint. It saves duplication of proof—first, the hearing in court, and then, the Commissioner's hearing.

In this case petitioners had their day in court. They were represented by counsel. The issue of their fraud was heard and determined in that tribunal. This court perceives no good reason why it would be a denial of due process of law to have the evidence in fraud actions against real estate brokers in the Superior Court taken all over again in Commissioner's hearing to revoke or suspend their licenses.

And in this case petitioners again had their day on the Commissioner's hearing. They told their stories. They could have been represented by counsel, but waived that right. Indeed, there is force in the Attorney General's argument that the record of the Commissioner's hearing contains sufficient admissions and testimony of petitioners themselves to support the Commissioner's order.

In passing upon the constitutionality of any law, this court is bound by rigid rules.

It is the duty of this court to give force and effect to the questioned statute unless it appears clearly unconstitutional. (Richfield Oil Co. v. County of Los Angeles, 100 Cal. App. 2d 535.)

All presumptions and intendments are in favor of the constitutionality of a statute, and all doubts are resolved in favor of its validity and not against it. (Clark v. City of Pasadena, 102 Cal. App. 2d 198.)

The existence of facts supporting the legislative judgment is to be presumed, and the burden of overcoming the presumption of constitutionality is cast upon the assailant. (Durbin v. Superior Court, 37 Cal. 2d 345.)

Applying these rules to the code sections questioned here, they must be held to be constitutional.

The judgment is affirmed.

DRAPEAU, *J.*

I concur: WHITE, *P. J.*

I dissent: DORAN, *J.*